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IN THE

Supreme Court of The United States

October Term, 1966

No. 45

RONALD R. CICHOS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR REHEARING

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

Grounds for Rehearing

Petitioner respectfully submits that the interrelation of the Indiana offenses of reckless homicide [Burns Indiana Statutes Annotated §47-2001 (a)] and involuntary manslaughter (Burns Indiana Statutes Annotated §10-3405) has resulted in misconstruction of both the Indiana Supreme Court Decision and the law pertaining thereto. The majority opinion herein is predicated upon certain interpretations of the Indiana law as gleaned from the Indiana Supreme Court Opinion. It is submitted that such statements misconstrue the Indiana law and, even if such pronouncements by the Indiana Supreme Court have been correctly construed, such have, nevertheless, been changed by a subsequent decision of that Court.

Initially, the majority opinion is based upon the statement by the Indiana Supreme Court that it is the "practice" of the trial court in Indiana in cases of this nature "of telling the jury to return a verdict on only one of the charges in view of the limitation on penalty." However, in this case the jury was not told to return a verdict on only one count. In fact, Instruction No. 10 charges that:

> ". . . if you find defendant guilty but do not say on which Count then that is equivalent to finding defendant guilty on both Counts and then the Court would impose the highest penalty fixed by Statute and will not impose any penalty on the other Count. . . ."[1]

That same instruction also specially charged the jury that a failure to find guilt *on either charge was equivalent to acquittal on that charge.* That portion of the instruction is as follows:

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[1] Petitioner has included in the Appendix herein all instructions thought pertinent on this question.

"... if you find defendant guilty of either count of the affidavit and say nothing about the other count, that would be equivalent to finding him not guilty on the count you do not mention...."

As a matter of fact, had the jury been so charged to return a verdict on only one, it would be directly contrary to the Indiana procedures and statutes which provide that the court, not the jury, determines the punishment. Under Burns Indiana Statutes Annotated §9-1820 it is the court, not the jury, that determines the sentence in *felony* cases. The jury function is merely the determination of guilt or innocence on a particular charge. That statute is as follows:

"INDETERMINATE SENTENCES — VERDICT IN FELONIES—AGE—SENTENCE TO INDIANA REFORMATORY.—In all cases of felony tried hereafter, before any court or jury in this state, if the court or jury find the person on trial guilty of a felony, it shall be the duty of such court or jury to further find and state whether or not the defendant is over sixteen (16) years of age and less than thirty (30) years of age. If such defendant be found to be between said ages and be not guilty of treason or murder in the first or second degree, it shall only be stated in the finding of the court or the verdict of the jury that the defendant is guilty of the crime as charged, naming it, and that his age is that found to be his true age, and the court trying such, if such person has passed the full age of twenty-one (21) but has not passed the full age of thirty (30) years, and has not been theretofore convicted of a felony, the court shall sentence such person to the custody of the board of trustees of the Indiana Reformatory, as guilty of the crime in such finding or verdict, and that he be confined therein for a term not less than the minimum time prescribed by the statutes of this state as a punishment for such offense, and not more than the maximum time prescribed by the statutes therefor, sub-

ject to the rules and regulations established by such board of trustees, and it shall be the duty of the board of trustees of said reformatory, to receive all such convicted persons, and all existing laws requiring the courts of this state to sentence such persons, to the penitentiaries or prisons of this state, are hereby modified and changed as to make it the duty of such courts to sentence such prisoners to the Indiana Reformatory. The board of trustees may terminate such imprisonment when the rules and requirements of such reformatory have been lived up to and fulfilled, according to the provisions of this act: Provided, That if such person be between the ages of twenty-one (21) and thirty (30) years and shall have been therefore convicted of a felony, the court in its discretion may sentence such person to the Indiana State Prison."

In fact, Burns Indiana Statutes Annotated §47-2002 which permits the joinder of these two offenses involved in this case provides that only one "*penalty*" shall be imposed. Nothing therein contemplates the selection of such penalty by the jury by its failure to return a verdict on one count or the other.

Petitioner submits that even if the opinion of the Supreme Court of Indiana has been correctly construed as reversing the long established rule that silence amounts to an acquittal, nevertheless, such construction has been subsequently changed *sub silentio*. Petitioner submits that the law prior to the Indiana Supreme Court decision in this case had long held silence on one or more counts of a charge to amount to an acquittal. This was briefed fully in this cause. If the Indiana Supreme Court held in *Cichos v. State*, —— Ind. ——, 208 N.E. 2d 685 (1965) in its decision below that in cases of horizontal, nonincludible offenses, silence as to one count is not an acquittal, it (Indi-

ana Supreme Court) has, nevertheless, reaffirmed the original rule *since* its opinion in this case. Thus, in *Anderson v. State,* —— Ind. ——, 214 N.E. 2d 172 (1966), the Indiana Supreme Court was also concerned with horizontal, nonincludible offenses (in that case one count charged inflicting a wound while attempting to commit robbery and the second assault and battery with intent to commit the same robbery). These are also the type of horizontal, nonincludible offenses which the court below denominated in this case as different charges for "the same unlawful transaction." The court in *Anderson* stated that jury silence as to Count One "amounted to a finding of not guilty thereon." Whether this means that the *Anderson* case explains the *Cichos* decision below as accepting the proposition that jury silence has always been equivalent to acquittal in Indiana in regard to horizontal, nonincludible offenses or whether the Indiana Supreme Court in *Anderson* has, in fact, changed the *Cichos* verbiage is of no consequence. The fact remains that the law clearly recognizes jury silence as acquittal in Indiana.[2]

Silence, by all logic, must be an acquittal in a criminal proceeding. A criminal defendant certainly could not be sentenced for involuntary manslaughter on a conviction of reckless homicide only.

CONCLUSION

These offenses are admittedly duplicitous as charging identical elements under two separate offenses. This does not diminish or mitigate the import of dual jeopardy on the second trial; it rather aggravates such. To affirm the

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[2] Actually, as the dissenting opinion of Mr. Justice Fortas herein points out, the cause should be reversed because of the *dual jeopardy* on the second count whether its conclusion resulted in an acquittal or in a conviction.

conviction here would be to permit enactment of numerous offenses with identical elements which could not only be all charged against a defendant at one trial but subsequently could be charged in sequential fashion on a retrial were he convicted on only one of such counts. The fact remains clear in this case that Petitioner stood in jeopardy four times at two trials for one substantive offense.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, the judgment of the Supreme Court of the State of Indiana be reversed.

JOHN P. PRICE
CLEON H. FOUST
WARREN BUCHANAN
JOHN B. McFADDIN

Counsel for Petitioner

Certificate of Counsel

I, John P. Price, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Counsel for Petitioner

APPENDIX

Court's Preliminary Instruction No. 5 (Given)

"The defendant has entered a general plea of not guilty to the two charges contained in the two Counts of the affidavit. And upon the issues joined you may find the defendant guilty generally as charged in the affidavit, if the evidence warrants beyond a reasonable doubt, or not guilty generally as charged in the affidavit.

"And a general finding of guilty as charged in the affidavit in this cause is equivalent of a finding of guilty on the Count carrying the highest offense.

"You may find the defendant guilty, if the evidence warrants beyond a reasonable doubt, on the First Count of the affidavit charging Reckless Homicide, or guilty, if the evidence warrants beyond a reasonable doubt, on the Second Count of the said affidavit charging Involuntary Manslaughter.

"You can find the defendant guilty, if the evidence warrants beyond a reasonable doubt, of one of the included offenses in Count Two of the affidavit, of either assault and battery or of simple assault"

Court's Instruction No. 9 (Given)

"The Court instructs you that the following numbered verdicts cover any possible verdict that this jury is authorized to return and they are as follows:

'1. We, the jury, find the defendant not guilty.

'2. We, the jury, find the defendant guilty as charged and find his age to be ——— years.

'3. We, the jury, find the defendant guilty of Reckless Homicide as charged in Count One of the Affidavit and fix his age to be — years.

'4. We, the jury, find the defendant guilty of Reckless Homocide as charged in Count One of the Affidavit and fix his punishment at:

a) A fine of $——. (Not less than $100 nor more than $1000.), or,

b) Imprisonment on the Indiana State Farm for ———. (Anytime not less than 60 days nor more than 6 months.) (Designate days or months), or,

c) A fine of $——— (not less than $100 nor more than $1000) and imprisonment in the Indiana State Farm for ————.) (Anytime not less than 60 days nor more than 6 months.)

(Designate days or months).

'5. We, the Jury, find the defendant guilty of Involuntary Manslaughter as charged in Count Two of the Affidavit and find his age to be ——— years.

'6. We, the jury, find the defendant guilty under Count Two of the Affidavit of the included offense of Assault and fix his punishment at:

a) A fine of $———. (Not exceeding $1000), or,

b) A fine of $———. (Not exceeding $1000) and imprisonment on the Indiana State Farm for ———. (Anytime not exceeding six months). (Designate days or months).

'7. We, the jury, find the defendant guilty under Count Two of the Affidavit of the included offense of Assault and fix his punishment at:

a) A fine of $———, (Not exceeding $500), or,

b) A fine of $————, (Not exceeding $500) and imprisonment on the Indiana State Farm for ———— (anytime not exceeding six months)."

Court's Instruction No. 10 (Given)

"The Court instructs you that if you should find the defendant guilty you also prescribe and fix the penalty in case it is a misdemeanor and in case it is a felony the statute fixes the penalty and you do not fix the penalty.

"A misdemeanor is where the punishment is by a fine or imprisonment in the County Jail or the State Farm, or by both a fine and such imprisonment, and in case of a felony the statute fixes the penalty.

"And a felony is where the penalty prescribed by statute fixes an imprisonment in one of the State Prisons for an indeterminate period of years, the limits being set by statute.

"In case you find defendant guilty of a felony, you only find him guilty and his age. If he is found to be over 30 years of age he will be sent to the State Prison and if he is under 30 years of age he will be sent to the Reformatory.

"If you find defendant guilty on either count of the affi-

davit and say nothing about the other count that would be equivalent to finding him not guilty on the count you do not mention.

"Under the reckless homicide statute, which is Count One of the affidavit, you could find defendant guilty of a felony or a misdemeanor depending upon the penalty you prescribe.

"Under the involuntary manslaughter charge, which is Count Two of the affidavit, you could find him guilty of a felony only or you could find him guilty of an included offense either of assault and battery or simple assault, either of which included offenses would be a misdemeanor and you are to fix the penalty which is indicated on the form of verdicts given you.

"If you find defendant guilty but do not say on which Count then that is equivalent to finding defendant guilty on both Counts and then the Court would impose the highest penalty fixed by statute and will not impose any penalty on the other Count.

"If you will examine the written verdicts which the Court will now hand you, you can see that they provide for any possible verdict you may desire and are authorized to return and you are to fill in any blanks as indicated.

"If you should find the defendant not guilty, all you will need to do is to return that verdict with the signature of the foreman. If he is found not guilty and no count is

mentioned, he is acquitted on both counts of the affidavit."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 45.—October Term, 1966.

Ronald R. Cichos, Petitioner, v. State of Indiana. | On Writ of Certiorari to the Supreme Court of Indiana.

[November 14, 1966.]

Mr. Justice White delivered the opinion of the Court.

Following petitioner's trial in the Circuit Court for Parke County, Indiana, under a two-count affidavit charging him with reckless homicide and involuntary manslaughter, the jury returned a verdict reciting only that he was guilty of reckless homicide. Petitioner was sentenced to one to five years in prison and was fined $500 plus court costs. He appealed, and the Supreme Court of Indiana granted a new trial. Petitioner was retried on both counts, and the second jury returned the same verdict as the first. He was again sentenced to one to five years in prison but was fined only $100 plus court costs. The Supreme Court of Indiana affirmed this reckless homicide conviction, rejecting petitioner's contention that his retrial on the involuntary manslaughter count had subjected him to double jeopardy in violation of the Indiana and United States Constitutions.[1]

Asserting that the first jury's silence with respect to the manslaughter charge amounted to an acquittal under Indiana law and that his retrial on that charge placed him twice in jeopardy, compare *Green* v. *United States*, 355 U. S. 184, petitioner presented a single question in his petition for certiorari which we granted: Is the Fifth

[1] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U. S. Const., Amend. 5. "No person shall be put in jeopardy twice for the same offense." Ind. Const., Art. I, § 14.

Amendment's prohibition against placing an accused in double jeopardy applicable to state court prosecutions under the Due Process Clause of the Fourteenth Amendment?

Because of the following considerations, which have more clearly emerged after full briefing and oral argument, we do not reach the issue posed by the petitioner and dismiss the writ as improvidently granted.

1. The Indiana statutes define involuntary manslaughter as the killing of "any human being . . . involuntarily in the commission of some unlawful act." Ind. Stat. Ann. § 10–3405 (1956). The statutory penalty is two to 21 years imprisonment.[2] The crime of reckless homicide, created in 1939 as part of Indiana's comprehensive traffic code, is committed by anyone "who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person." Ind. Stat. Ann. § 47–2001 (a) (1965). For this crime, a fine and a prison term of from one to five years are authorized.

Recognizing the inherent overlap between these two crimes in cases of vehicular homicide, the Indiana Legislature has provided that

> "[A] final judgment of conviction of one (1) of them shall be a bar to a prosecution for the other; or if they are joined in separate counts of the same indictment or affidavit, and if there is a conviction for both offenses, a penalty shall be imposed for one (1) offense only." Ind. Stat. Ann. § 47–2002 (1965).

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[2] Indiana adopted the common-law crime of involuntary manslaughter early in its history. The crime has traditionally been applied by the Indiana courts to cases of vehicular accidents resulting in death. *E. g., Smith* v. *State*, 186 Ind. 252, 115 N. E. 943 (auto accident); *State* v. *Dorsey*, 118 Ind. 167, 20 N. E. 777 (railroad accident).

The Indiana courts have also recognized that reckless homicide "is a form of involuntary manslaughter," *Rogers* v. *State*, 227 Ind. 709, 715, 88 N. E. 2d 755, 758. Proof of reckless homicide necessarily establishes an unlawful killing that amounts to involuntary manslaughter. Both crimes require proof of the same elements to sustain a conviction under Indiana law. See *Rogers* v. *State, supra; State* v. *Beckman*, 219 Ind. 176, 37 N. E. 2d 531. Thus, the effect of charging the two crimes in a single affidavit, as occurred in this case, was to give the jury the discretion to set the range of petitioner's sentence at two to 21 years by convicting him of involuntary manslaughter or at one to five years by convicting him of reckless homicide. As the Indiana Supreme Court in the case before us explained, "the offenses here involved are statutorily treated more as one offense with different penalties rather than viewing reckless homicide as an included offense in involuntary manslaughter."

2. Petitioner does not assert that he should not have been tried again for reckless homicide. His only claim is that he should not have been tried again for involuntary manslaughter as well as reckless homicide because the jury's silence at his first trial with respect to involuntary manslaughter was legally an acquittal on this charge.

However, the Indiana Supreme Court squarely rejected this interpretation of the first jury's verdict. The court distinguished a long line of Indiana cases which have held that a jury's silence must be deemed an acquittal.[3] Because of the identity of the elements of

[3] This doctrine developed in response to contentions that silence on any count required the setting aside of the entire verdict under the common-law rule that a defendant has an absolute right to a jury verdict on all charges for which he is tried. See *Weinzorpflin* v. *State*, 7 Blackf. (Ind.) 186 (1844). Since a reckless homicide conviction is a statutory bar to further prosecution for involuntary

these two crimes, and because the Indiana Supreme Court knew of "the trial court practice of telling the jury to return a verdict on only one of the charges in view of the limitation on penalty," [4] the court concluded that "a verdict of guilty of reckless homicide does not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter." Therefore, "[T]he logic of the principle which states silence is equal to an acquittal is perhaps made inappropriate to charges of these offenses, related to the same unlawful transaction . . . . Rather than treat the silence of the jury in the involuntary manslaughter count in this case as an acquittal, the better result would seem to be to hold that the reckless homicide verdict encompassed the elements of involuntary manslaughter, and that appellant was simply given the lesser penalty."

In the face of the Indiana statutory scheme and the rulings of the Indiana Supreme Court in this case, we cannot accept petitioner's assertions that the first jury acquitted him of the charge of involuntary manslaughter and that the second trial therefore placed him twice in jeopardy. Consequently, we do not reach or decide the question tendered by the petition for certiorari, and the writ is dismissed as improvidently granted.

It is so ordered.

While concurring with the Court's opinion, MR. JUSTICE BLACK adheres to his views in *Bartkus* v. *Illinois*, dissent, 359 U. S. 121, 150, to the effect that the Fourteenth Amendment makes the double jeopardy provision of the Fifth Amendment applicable to the States.

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manslaughter, § 47–2002, *supra*, petitioner cannot be adversely affected by the jury's silence with respect to the involuntary manslaughter count.

[4] The judge's charge to the jury in the first trial is not a part of the record in this case.

SUPREME COURT OF THE UNITED STATES

No. 45.—October Term, 1966.

Ronald R. Cichos, Petitioner, v. State of Indiana.	On Writ of Certiorari to the Supreme Court of Indiana.

[November 14, 1966.]

Mr. Justice Fortas, with whom The Chief Justice and Mr. Justice Douglas join, dissenting.

If this were a federal case, it would, in my view, be covered by *Green* v. *United States*, 355 U. S. 184 (1957). In *Green*, the defendant was not acquitted of the first degree murder charge at the first trial. Just as in the present case, the jury did not return a verdict on that count, but convicted Green on the lesser charges of arson and second degree murder. But this Court held that Green could not be retried on the first degree murder charge. It clearly and unmistakably held that whether Green was "acquitted" of the greater offense was of no consequence. He had been exposed to jeopardy. See 355 U. S., at 188, 190–191. So, in the present case, it is of no consequence whether the silence of the jury on the involuntary manslaughter count amounted to acquittal. Petitioner was put in jeopardy on that count and cannot again be tried on that charge.

The only difference between *Green* and the present case—except as to the jurisdictions—is that in *Green*, on the second trial, the defendant was convicted on the aggravated count. In the present case, petitioner was again convicted on the less serious charge. I cannot see that this can justify a difference in result. Petitioner should not have been retried on an affidavit including the more serious charge, which was not involved in the appeal. That charge was dead—beyond resuscitation. Its wrongful inclusion in the indictment was materially

harmful to petitioner. First, it exposed him to the hazards of prosecution and conviction for the more onerous offense. Second, it again gave the prosecution the advantage of offering the jury a choice—a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence. See *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844 (C. A. 2d Cir. 1965), cert. denied, 383 U. S. 913 (1966). And beyond the question of injury to the petitioner in this particular case is the fact that the procedure which Indiana used chills the right of appeal. It "has the necessary effect of unlawfully burdening and penalizing the exercise of the right to seek review of a criminal conviction." *United States* v. *Ewell*, 383 U. S. 116, 130 (1966) (dissenting opinion). Defendants in Indiana in this type of case are admonished that if they appeal from a conviction on the less onerous charge they do so at the peril that on the next trial they may be tried, and possibly convicted, on the more serious count.

This is a State case. But the Fourteenth Amendment's requirement of due process, in my view, certainly and clearly includes a prohibition of this kind of heads-you-lose, tails-you-lose trial and appellate process. See the dissent of Mr. Justice Black in *Bartkus* v. *Illinois*, 359 U. S. 121, 150 (1959); *Brock* v. *North Carolina*, 344 U. S. 424, 429, 440 (1953) (dissenting opinions of Vinson, C. J., and Douglas, J.).

The Second Circuit's views are in accordance with the position stated herein. See *United States ex rel. Hetenyi* v. *Wilkins*, *supra*.

I would reverse and remand.